Supreme Court, U.S.
FILED
DEC 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-887

# In the Supreme Court

## of the United States

OCTOBER TERM, 1986

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LARRY W. PASSAGE, et al., *Petitioners,*

v.

PRUDENTIAL-BACHE SECURITIES, INC., et al., *Respondents.*

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**BRIEF OF RESPONDENTS G.T. MURRAY, WILLIAM CROWLEY, RICHARD DOBBINS, G.T. MURRAY & CO., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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The Respondents, G.T. Murray, William Crowley, Richard Dobbins, G.T. Murray & Co., respectfully pray that this court deny issuance of a writ of certiorari to review the udgment and opinion of the Supreme Court of Montana in the above matter.

## OPINIONS BELOW AND JURISDICTION

Respondents agree that the opinions below are as set forth in the petition and Respondents agree with the jurisdictional statement in the petition.

## QUESTION PRESENTED

Respondents accept the question presented although the opinions below did not find the contract in question to be adhesive or the arbitration clause itself to be adhesive.

## STATUTORY PROVISIONS INVOLVED

Respondents agree that Petitioners have set forth in their petition 9 U.S.C. § 2 which is involved in this matter but contend 17 C.F.R. § 240.15C2-2 is not applicable since Petitioners in their action did not allege any violations of Federal securities statutes but instead brought this action under Montana state statutes in a state district court. This section of the Code of Federal Regulations has no relevance with regard to arbitration of state securities law actions.

## STATEMENT OF THE CASE

Petitioners have accurately stated the case in their petition except that the statement should be amplified to include the facts that no evidence was ever introduced by affidavit or otherwise that Petitioners did not read the contract in question, including the challenged arbitration clause, or that Petitioners failed to understand the import or consequences of executing such contract or that Petitioners ever took exception in any form to such contract or arbitration clause. For that matter no argument to this effect was ever made by Petitioners.

## PRESERVATION OF THE QUESTION RAISED FOR REVIEW

The initial appeal of the district court's opinion was filed by Respondents. Petitioners and Prudential Bache cross appealed.

Petitioners cross appealed, in part, on the issue "are 'adhesion contracts' to arbitrate routinely enforceable?"

## REASONS FOR DENYING THE WRIT

### 1. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

Under United States Supreme Court Rule 17 concerning considerations governing review on certiorari this court will grant certiorari only when there are special and important reasons therefore. Included in such reasons under the rule are:

> "(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.
>
> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court."

To Respondents' knowledge no state or federal court has held the securities brokers contracts in question to be unenforceable under adhesion theories. The question has been considered by federal courts in several circuits and unenforceability because of asserted adhesion theories denied. *See e.g. Rush v. Oppenheimer & Co., Inc.*, 638 F. Supp. 872 (S.D. N.Y. 1986); *Surman v. Merrill Lynch*, 733 F.2d 59, 61 n.2 (8th Cir. 1984); *Brener v. A.G. Becker Paribas, Inc.*, 628 F.Supp. 442 (S.D. N.Y. 1985); *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984); *Tinkle and Ross v. A.G. Becker Paribas, Inc.*, 622 F.Supp. 1505 (D.C. N.Y. 1985). The decision of the Montana Supreme Court in this case does not conflict with any decision of this court. The extensive consideration of arbitration provisions in brokers' contracts by this Court and the universal treatment of the question in at least several federal decisions from various circuits refutes the importance of the question

presented in the request for a writ. Issuance of the writ should therefore be denied.

2. THE MONTANA SUPREME COURT FULLY CONSIDERED THE ISSUES PRESENTED HERE AND DECIDED THE SAME CORRECTLY.

The Montana Supreme Court fully considered the issues presented here and decided the same correctly relying on this Court's strong approval of such agreements in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), as did the district court. The court found that the Petitioners invested a significant amount of money with Respondents and there has been no suggestion they require protection because they are in any way improvident persons. App. 5. The court correctly analyzed *Southland's* requirement that there are only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a "contract evidencing a transaction involving commerce" and such clause may be revoked upon "grounds as exist at law or equity for the revocation of any contract." App. 5. In concluding that such arbitration agreements are not outside the reasonable expectations of the investor nor are they contrary to public policy, as indicated by the judicial and legislative presumption favoring arbitration of such disputes, the court found the arbitration clause in this case was within the reasonable expectations of the parties nor is there any evidence that the clause is oppressive or unreasonable. App. 7. Thus, the Court found, as federal courts in several circuits have found, such clauses are not revocable upon "grounds as exist at law or equity for the revocation of any contract." In reaching its decision on this issue the court stated:

> "In *Southland*, which like the present case involved allegations of fraud and misrepresentation, the public policy of enforcement of arbitration clauses was forcefully stated. We conclude that even if a customer agreement form is an adhesion contract, there is nothing on the record and no compelling law

> to prevent enforcement of the arbitration clause. We affirm the district court's holding that the arbitration clause is enforceable."

App. 7.

The Montana Supreme Court therefore fully considered the issues present here and under its analysis of *Southland* reached the correct result.

## CONCLUSION

For these reasons, a writ of certiorari to review the judgment and opinion of the Supreme Court of Montana should be denied.

Respectfully submitted,

LUXAN & MURFITT

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## CERTIFICATE OF SERVICE

I, Michael J. Mulroney, hereby certify that on this _____ day of December, 1986, three copies of the Brief of Respondents G.T. Murray, William Crowley, Richard Dobbins, G.T. Murray & Co., in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to:

Mr. W. William Leaphart, Leaphart Law Firm, 1 North Last Chance Gulch, Helena, MT 59601, counsel for the Petitioners.

Mr. Dan Shea, at 800 Broadway, Helena, MT 59601, counsel for Prudential-Bache Securities.

I further certify that all parties required to be served have been served.

Michael J. Mulroney